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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-305

UNITED STATES OF AMERICA,

Petitioner,

vs.

J. LEE HAVENS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT.

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OPINION BELOW.

The opinion of the Court of Appeals for the Fifth Circuit, reversing respondent's conviction at trial and remanding the case to the United States District Court for the Southern District of Florida for a new trial is reported at 592 F. 2d 848.

QUESTION PRESENTED.

The government incorrectly presents the question which is before this Court. Therefore, respondent submits the following as an accurate statement of the question presented:

> Whether evidence suppressed as the fruit of an unlawful search and seizure may nevertheless be introduced into evidence in an attempt to impeach a defendant's cross-examination testimony at trial, where the evidence does not contradict the defendant's testimony on direct examination.

STATEMENT OF THE CASE.

The Statement presented by the government in its brief does not fully state the relevant facts, and it therefore requires amplification.

I. Summary of the Facts.

Following a jury trial in the United States District Court for the Southern District of Florida, respondent was convicted of possessing cocaine with intent to distribute it and of importing and conspiring to import cocaine, in violation of 21 U. S. C. 841(a)(1), 952(a), 960(a)(1), and 963. He was sentenced to three concurrent eight year terms of imprisonment, to be followed by a special parole term of three years, and to a fine of $5,000.00.

Government witness John Kenneth McLeroth, an unemployed attorney,[1] testified that he had personally smuggled cocaine into the United States because he had been asked to do so by respondent. He was essentially the sole witness against respondent, who, for reasons not established by the government, was traveling with the smuggler he had allegedly hired.

McLeroth,[2] who had made numerous trips to South America over a period of the past several years (R. 68), made three trips to Peru in the company of respondent during 1977: once in April and twice in September (R. 82-117).

---

1. McLeroth testified that he had filed no income tax return for several years because he had no income (R. 193).

2. McLeroth was originally a co-defendant in this case. Prior to trial McLeroth agreed to testify for the government against respondent. In return for his testimony, McLeroth, who was charged with the same offenses as respondent, had two counts against him dismissed on motion of the government, and he received a sentence of five years' probation for importation of cocaine.

McLeroth testified that on the April trip,[3] with respondent's help, he had smuggled a substantial quantity of cocaine into the United States. He said that the cocaine was placed about his body and that respondent had helped wrap his body with ace bandages and tape to hold the cocaine securely in place (A. 18).

McLeroth then testified that an improved technique was developed for subsequent trips whereby a pocketed shirt was to be used, and the wrapping of his body with tape and bandages was to be abandoned (A. 20-21).

He testified that prior to his first trip in September, respondent had met with him in Fort Wayne, Indiana, and had given him a T-shirt with pockets sewn on it for the purpose of smuggling cocaine (A. 20-21). McLeroth further said that he wore the T-shirt to Peru on that first trip early in September. He said that no cocaine was available in Peru then, necessitating a second trip, later in the month (A. 21-22). At the conclusion of the second September trip McLeroth was arrested, on October 2, 1977, wearing the pocketed T-shirt filled with thirteen packages of cocaine (A. 28). On that date he and respondent arrived at Miami International Airport on a flight from Lima, Peru. Respondent cleared customs and left the customs area. McLeroth was searched, and the cocaine was discovered. After initially indicating to authorities that he had been acting alone in the smuggling venture, McLeroth subsequently made a statement implicating respondent (R. 135).[4]

Respondent had proceeded to the domestic portion of the air terminal and booked passage home to Indiana, later in the afternoon. He checked his luggage with United Air Lines.

As respondent was about to board his flight to Indiana several hours later, he was arrested. His luggage was seized, without a

3. The trip in April, 1977 was respondent's first trip to South America (R. 346).

4. Respondent maintained both at his arrest (R. 54-55) and at trial that he was engaged as a legitimate businessman seeking to establish a business exporting goods to Peru (R. 344-356).

warrant, from the domestic airline. Prior to trial the court held the seizure and subsequent search of respondent's luggage to be in violation of his rights under the Fourth Amendment to the United States Constitution, and the contents of his luggage were ordered suppressed as evidence (Motion to Suppress Hearing, January 18, 1978).[5]

The suppressed contents of respondent's luggage contained no controlled substance of any kind, but did include, according to government DEA agents, two T-shirts which were not respondent's size. They had been cut up in a manner suggesting that the cut away portions had been used to fabricate the pockets for the smuggling shirt McLeroth had taken with him to South America early in September and which he was wearing, returning from a later trip (on October 2, 1977) filled with cocaine (A. 36-38). The government advanced no theory to explain why respondent was traveling with these scraps, or more importantly, why respondent was returning from South America with remnants of a shirt manufacturing process which it alleged was completed weeks earlier in Indiana, *prior to a previous trip* (p. 4, *supra*).

5. The government's gratuitous assertion in its brief at page 3, footnote 1, to wit: that the suppression order was not appealed because it was felt that there was sufficient evidence to convict without the suppressed evidence deserves a response. The government's sole witness to the matters upon which the indictment was based was Mr. McLeroth, who can most charitably be described as unreliable. He was an admitted frequent traveler to South America before ever traveling there with respondent. While he testified that he had so little income for the prior several years that he had not been required to file any tax returns, defendant's exhibits showed that he had run over a quarter of a million dollars through his personal checking account in the years 1974-5-6 (D. Ex. 1; R. 417), and that his telephone bills were frequently thousands of dollars per month (D. Ex. 2; R. 185). Further, the assertion is ironic in light of the lengths to which the government has gone to use the illegal evidence. The suppression ruling was, in fact, fully supported by existing law. See respondent's (defendant's) memorandum on the matter filed prior to the suppression hearing of January 18, 1978.

II. Trial Testimony.

At trial, respondent testified in his defense and denied guilt on both direct examination and cross-examination.

A. *Direct examination.* A portion of respondent's direct examination testimony which is relevant to the issues raised by the government follows (A. 34):

> Q. And you heard Mr. McLeroth testify earlier as to something to the effect that this material was taped or draped around his body and so on, you heard that testimony?
>
> A. Yes, I did.
>
> Q. Did you ever engage in that kind of activity with Mr. McLeroth and Augusto or Mr. McLeroth and anyone else on that fourth visit to Lima, Peru?
>
> A. I did not.
>
> Q. Now, this is the fourth visit to Peru, on the return, was the time that Mr. McLeroth was stopped and arrested for the possession and so forth, of cocaine.
>
> I will ask you first whether or not you knew that he, McLeroth, was bringing cocaine back into the United States from Lima, Peru.
>
> A. No. I did not.
>
> Q. Now, when you returned from Lima, Peru, into the United States, did you come into the Miami International Airport?
>
> A. Yes, I did.
>
> Q. And I will ask you whether or not you proceeded through Customs. You.
>
> A. Yes, I did.
>
> Q. I will ask you whether or not you were arrested with cocaine on your body or luggage or anywhere else.
>
> A. No, I was not.

B. *Cross-examination.* A portion of respondent's cross-examination testimony which is relevant to the issues raised by the government follows[6] (A. 34-35, 46-48):

6. All of the following cross-examination interrogation of respondent by the government was in the presence of the jury.

> Q. Take your time and examine that, sir.
>
> A. All right.
>
> Q. What size is that shirt?
>
> A. A 38-40.
>
> Q. What size do you wear, sir?
>
> A. A 46. 44, sometimes, 46, sometimes.
>
> Q. This would not be your shirt?
>
> A. No, it would not.
>
> Q. Now, on direct examination, sir, you testified that on the foutrh trip you had absolutely nothing to do with the wrapping of any bandages or tee shirts or anything involving Mr. McLeroth; is that correct?[7]
>
> A. I don't—I said I had nothing to do with any wrapping or bandages or anything, yes. I had nothing to do with anything with McLeroth in connection with this cocaine matter.

At this point the jury was excused, the respondent was sent from the courtroom by the trial judge, and a lengthy discussion ensued between the trial judge, prosecutor, and defense counsel over the latter's objection to the line of questioning that the prosecution was pursuing (A. 36-45).

The jury then returned and the cross-examination continued (A. 46):

> Q. Mr. Havens, calling your attention to the testimony earlier when I was on cross-examination, you said that you wear a Size 44-46 tee shirt. Is that correct?
>
> A. Yes. That would fit me.
>
> Q. But you don't wear a Size 38 to 40 tee shirt?
>
> A. No. Not for many years.
>
> Q. On October 2, you flew from Peru into the Miami International Airport, is that correct?
>
> A. Yes, I did.
>
> Q. And you took your baggage and cleared Customs; is that correct?

7. The question by the prosecution on cross-examination was the first time that any reference had been made during respondent's testimony to T-shirts.

A. Yes.

Q. On that day, sir, did you have in your luggage a Size 38-40 medium man's tee shirt with swatches of clothing missing from the tail of that tee shirt?

A. Not to my knowledge.

Mr. Culverhouse: Can I have an Identification tag put on this?

The Court: Consider it as Government's 9 for Identification. And show it to the witness.

By Mr. Culverhouse:

Q. Mr. Havens, I'm going to hand you what is Government's Exhibit 9 for Identification and ask you if this tee shirt was in your luggage on October 2nd, 1975.

A. Not to my knowledge. No.

Q. Sir, on October 3, 1977, you were leaving Miami, Florida, to return to Ft. Wayne, Indiana. Is that correct? correct?

A. That's correct.

Q. And, at that time, did you pick up your luggage from Agent Martinez of the Drug Enforcement Administration?

A. Yes, I did.

Q. And, at that time, did you tell Agent Martinez that that tee shirt that was found in your luggage did not belong to you, but belonged to John McLeroth?

A. No, I did not say those words. No.

Q. What words did you say?

A. I said that—they showed me a tee shirt when I went up to pick up my luggage, and this may well have been the tee shirt that they showed me, I don't know, they said:

"What size shirt do you wear?"

And I said, "I wear," I think I said, "a 46, usually."

But I don't wear—I don't wear this type of shirt. My shirts—my undershirts are the single straps over the—and—so, I said;

"I"—they asked me, I believe, if Mr. McLeroth wore this size shirt.

And I said, "He probably does. He is somewhat smaller than I."

But I said, "I definitely don't wear this size shirt."

They held this one up and they held another one, I think, or one that looked like this, and another one, and to my knowledge, that was the first time that I had seen those shirts, and I don't know whose they were or whose they are. I know they're not mine. I know I didn't put them in my suitcase.

And, I know I didn't see them in my suitcase.

I only saw these—well, I'll take it back.

The agent the next—the day I took my luggage, the agent brought in my suitcase.

And he said, "Let me give you a receipt for this."

"For your suitcase back."

And I says, "I don't need a receipt. I just want to get out of here." I had spent the night in jail.

And he said, "No, no, let's look through it."

So, he reached in the suitcase and pulled this out. And this was the first time that I had seen the shirt.

He said, "Is this yours?"

And we went through that conversation that I just related.

* * * * *

Q. And that tee shirt is Size 38-40 in that bag?

A. Yes. Medium, 38-40.

Q. And it's like Exhibit No.—

A. I couldn't say. Yes, the label appears to be identical.

Q. Sir, is it your testimony that on October 2, 1977, when you came through Customs that this was not in your suitcase?

A. No. I never saw these items in my suitcase until an agent pulled them out of the bag on October 3rd; the day afterwards when I went to pick them up.

I'm not saying they weren't in my suitcase. I don't know that. I know that if they are in my suitcase I had no knowledge of them being there.

Q. Did you pack your suitcase?
A. Yes, I did.
Q. In Peru.
A. Yes.
Q. Sir, are you suggesting that the agents of the Drug Enforcement Administration placed this in your suitcase?
A. I am not suggesting anything. I am just testifying to what I know.

C. *Rebuttal.* On rebuttal the government called the DEA agent from whom respondent had received his luggage on the day following his arrest (October 3). The agent testified that respondent had been made aware that the T-shirts which were suppressed as evidence were in his luggage on October 2, not on October 3. Agent Martinez never disputed respondent's testimony regarding the display of the shirts on October 3 or the conversation relating to the "discovery" of the shirts at that time (A. 50-52).

SUMMARY OF ARGUMENT.

The Court of Appeals for the Fifth Circuit reversed respondent's conviction at trial because the trial court had erroneously permitted suppressed evidence to be admitted in evidence in an effort to "impeach" respondent's cross-examination testimony. Respondent had not testified about the suppressed evidence on direct examination, and the Court of Appeals held that *Agnello* v. *United States,* 269 U. S. 20 (1925) controlled.

I. The government contends that *Agnello* should be overruled because the Court has "abandoned the premise" of *Agnello* and further, that there should be no logical difference between impeachment of direct testimony and impeachment of cross-examination testimony. The first part of that contention is clearly not supported by a review of applicable cases, which either expressly or impliedly are consistent with *Agnello.* With respect to eliminating the distinction between using illegal evidence to impeach direct examination testimony and using it to impeach cross-examination testimony, the government has not considered that such action would result in a severe weakening of the protection granted society by the Fourth Amendment. The argument sets forth an analysis which demonstrates that danger, the principal area of concern being the greater incentives given certain groups to disregard the restrictions imposed by the Fourth Amendment.

The government argues that *Agnello* undermines the integrity of the judicial process by permitting perjury to go unchallenged. *Agnello* does nothing of the sort. Of course a defendant does not have the right to commit perjury, but it is when the government enters forbidden areas (made forbidden by its own illegal acts) on cross-examination that the possibility arises for false testimony which may not be impeached. Adequate restraints

against a defendant building a defense on false testimony through direct examination presently exist.

II. The government also contends that the Court of Appeals was in error in not finding that respondent's testimony on direct examination was sufficient to permit the use of the suppressed evidence to impeach that testimony. Respondent's testimony on direct examination did not deal in any manner with the suppressed evidence, and his direct testimony was well within his constitutional right to meet the charges made against him, without establishing any right in the government to use illegal evidence to impeach.

ARGUMENT.

I.

EVIDENCE WHICH HAS BEEN PROPERLY SUPPRESSED AS THE FRUIT OF AN UNLAWFUL SEARCH AND SEIZURE MAY NOT BE ADMITTED INTO EVIDENCE IN AN ATTEMPT TO IMPEACH A DEFENDANT'S CROSS-EXAMINATION TESTIMONY AT TRIAL, WHERE THE EVIDENCE DOES NOT CONTRADICT THE DEFENDANT'S TESTIMONY ON DIRECT EXAMINATION.

The government asserts that this Court:

> has never specifically considered the question whether illegally seized evidence is admissable to impeach testimony in response to cross-examination properly within the scope of defendant's direct examination. (Gov. Br. 8)

This assertion is inaccurate, and it reveals the failure of the government to understand *Agnello* v. *United States,* 269 U. S. 20 (1925) and its applicability to the present case.

The government misreads *Agnello* when it states:

> the Court held that certain illegally seized evidence could not be admitted to impeach the defendant's denial on cross-examination that he had ever seen that evidence. (Gov. Br. 8)

In *Agnello,* the defendant denied on cross-examination that he had *ever seen narcotics.* Then, by way of impeaching that statement, a can of illegally seized cocaine was produced by the prosecution and the defendant was interrogated about it. 269 U. S. at 29, 30. This was the impermissible act by the prosecution—the attempt to use the illegal evidence to contradict the defendant's cross-examination testimony that he had never seen narcotics. There was no holding that the general question

about narcotics was outside the scope of proper cross-examination. The holding was that producing the illegal evidence and asking the defendant about it was improper. A unanimous Court went on to say:

> In his direct examination, Agnello was not asked and did not testify concerning the can of cocaine. In cross-examination, in answer to a question permitted over his objection, he said he had never seen it. *He did nothing to waive his constitutional protection or to justify cross-examination in respect of the evidence claimed to have been obtained by the search.* 269 U. S. at 35 (emphasis added).

Thus, not only has the Court previously considered the question presented, it clearly treated cross-examination testimony in a different manner than direct examination testimony.

The government is also in error when it contends that subsequent decisions of this Court, notably *Walder* v. *United States,* 347 U. S. 62 (1954), *Harris* v. *New York,* 401 U. S. 222 (1971) and *Oregon* v. *Hass,* 420 U. S. 714 (1975) have "rejected the principal premise of *Agnello.*" (Gov. Br. 8).

The government defines the "principal premise" of *Agnello* to be that "illegally seized evidence shall not be used at all" (Gov. Br. 8). This sweeping generalization was made by the Court in *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 392 (1920). It was subsequently quoted in *Agnello* (therein doubtless lies the government's confusion), but it was not necessary to the Court's decision in *Agnello* and it most certainly was not the principal premise of that case.

The above quotation from *Agnello* confirms that it was the use of the illegal evidence on cross-examination that was objectionable, and the implication is quite clear that had the direct examination dealt with that evidence, the attempt at impeachment would have been proper.

In *Walder* v. *United States, supra,* the Court permitted the use of evidence (illegally obtained) to impeach the *direct testimony* of the defendant, and it specifically reconciled its holding with *Agnello, supra,* saying:

> The situation here involved is to be sharply contrasted with that presented by *Agnello* v. *United States.* There the government, after having failed in its efforts to introduce the tainted evidence in its case in chief, tried to smuggle it in on cross-examination by asking the accused the broad question, "Did you ever see narcotics before?" 347 U. S. at 66.

In *Harris* v. *New York, supra* the government was permitted to impeach the defendant's *direct testimony* by a prior, inconsistent statement which had not been obtained in conformity with *Miranda* v. *Arizona,* 384 U. S. 436 (1966). In *Harris* the illegally obtained statement clearly and beyond question gave lie to the defendant's direct testimony.

Oregon v. *Hass, supra,* was a case quite similar to *Harris,* where again the defendant's *direct testimony* was permitted to be impeached by a prior inconsistent statement that would not otherwise have been admissible. Again, the illegal evidence squarely contradicted the defendant's direct testimony.

Thus *Walder, Harris,* and *Hass* have set forth a policy modifying the general doctrine of the *Silverthorne* case, *supra,* which had prohibited all use of illegally seized evidence. As the Court stated in *Walder:*

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the Weeks doctrine would be a perversion of the Fourth Amendment. 347 U. S. at 65.

Therefore, as correctly perceived by the Court of Appeals, the holding of *Agnello* directly forbids the actions undertaken by the prosecutor in this case. Indeed, the cases subsequent to *Agnello*

affirm, either expressly, as in *Walder*, or impliedly, as in *Harris* and *Hass*, the continued vitality of the *Agnello* ruling.

The government, however, says:

> To the extent that Agnello must be read to prohibit the use of tainted evidence for impeachment when the cross-examination is proper,,[8] we submit that it should be overruled. (Gov. Br. 37).

Because Agnello is squarely in point, as the Court of Appeals determined and as the above discussion demonstrates, the government is simply asking that *Agnello* be overruled in its entirety.

Three grounds for overturning *Agnello* are advanced by the government.

A. For its first ground it alleges that the decisions of this Court do not establish a distinction between impeachment of direct examination testimony and impeachment of cross-examination testimony (Gov. Br. 13-21). As shown above, the holding in *Agnello* is obviously contrary to this assertion. Certainly the various Courts of Appeal have had little difficulty in perceiving this very clear difference. See, for example, *United States* v. *Trejo*, 501 F. 2d 138 (1974), *United States* v. *Mariani*, 539 F. 2d 915 (1976), *United States* v. *Whitson*, 587 F. 2d 948 (1978), *United States* v. *Hickey*, 596 F. 2d 1082 (1979).

B. For its second ground the government alleges that the rule adopted by the Court of Appeals in this case undermines the integrity of the judicial process by permitting perjury to go

8. The repeated use of the phrase "when the cross-examination is proper" by the government appears meaningless insofar as it applies to the issues here presented. As the government contends, wide scope is permitted for cross-examination. If the cross-examination is not relevant to the offense charged it does not take the Fourth Amendment to have the question stricken. If, however, it is relevant, it must be answered. The question of a "proper cross-examination question" and the use of illegal evidence to impeach cross-examination testimony are two distinctly separate issues.

unchallenged (Gov. Br. 21-28). Two points must be made in reply to this argument.

First, the decisions of this Court have established that a defendant cannot *build a defense* by testifying falsely on direct examination without fear of impeachment. See *Walder* v. *United States, supra, Harris* v. *New York, supra* and *Oregon* v. *Hass, supra.*

To extend this policy to cross-examination testimony, while it may be superficially appealing, would bring about a grave erosion of the safeguard of the Fourth Amendment. A discussion of policy implications is set forth in paragraph "C," below.

Second, while the government's brief is replete with references to the "perjury" of the respondent, a careful review of the Statement of the Case, *supra,* and of the full record of this case makes it quite plain that the truth or falsity of respondent's cross-examination testimony is not clearly established by the suppressed evidence. The government apparently feels that it is entitled to an assumption of perjury as a matter of law when testimony is offered at variance with the official government view. Indeed, the government's version of the facts surrounding the suppressed evidence was so extraordinary (see pp. 3-5, *supra*) and the government's chief witness against respondent was so discredited at trial (see footnote 5, *supra*), that any assumption of perjury is more appropriately placed on the government.

It is noted that the relevant exceptions to the exclusionary rule which were previously reviewed[9] involved impeachment of *direct examination testimony*, and further, in all cases the impeaching evidence clearly and without question established the falsity of that direct testimony. In this case the speculative nature of the suppressed evidence, for impeachment purposes, is apparent from the Statement of the Case, *supra.*

9. See discussion of *Walder* v. *United States, Harris* v. *New York* and *Oregon* v. *Hass, supra* at pp. 14-15.

In fact, the suppressed evidence was admitted into evidence in this case based upon the rebuttal testimony of DEA agent Martinez (A. 50-52). See the discussion between counsel and judge at pages 36-45 of Appendix.

Because respondent had offered no testimony on direct examination at trial concerning the suppressed, cut up T-shirts, the government attempted to create, solely through cross-examination, a conflict in testimony through which the introduction of the T-shirts could be justified on the ground of impeachment. Accordingly, the prosecutor handed the suppressed evidence to respondent, in the presence of the jury, and inquired if his luggage had contained the T-shirts on the day of respondent's arrest (October 2). Respondent testified that he had no knowledge of the T-shirts being in his luggage until the following day when the luggage contents were examined in his presence at DEA headquarters, and a receipt given for certain items (A. 47, 48). Agent Martinez then testified in rebuttal that he had made respondent aware of the suppressed evidence on October 2, not upon October 3 (A. 50, 51).

The trial judge thereupon permitted the suppressed evidence to be introduced in evidence to impeach respondent's alleged "lie" that he had not seen the shirts on the day of his arrest, but on the following day (Pl. Ex. 9, 10; R. 441).[10] The trial judge allowed the unrestricted use of the suppressed evidence in final argument to the jury, and the evidence was taken into the jury room during deliberation (A. 53, 54).

10. The trivial nature of the conflict in testimony is clear. Even the conflict is not all that certain. Observe the following testimony of respondent on cross-examination:

> Q. Sir, is it your testimony that on October 2, 1977, when you came through Customs that this was not in your suitcase?
>
> A. No. I never saw these items in my suitcase until an agent pulled them out of the bag on October 3rd; the day afterwards when I went to pick them up.
>
> I'm not saying they weren't in my suitcase. I don't know that. I know that if they are in my suitcase I had no knowledge of them being there. (A. 49)

If, in truth, the government had wished to contest respondent's statement about when he had seen the contents of his luggage, it would have been the DEA agent's *statement* at trial that would have put into issue the truthfulness of respondent's testimony, not the shirts themselves. The transparent device of the government is there for all to see. It was a deliberate attempt to smuggle in illegal evidence.

The trial judge allowed the prosecutor to do this in the apparent belief that it was permitted under recent decisions of the Supreme Court, namely *Harris* v. *New York, supra,* and *Oregon* v. *Hass, supra* (A. 40, 41).

C. The government's final ground for overturning *Agnello* v. *United States, supra* is that the general purposes and policies of the exclusionary rule do not require the exclusion for impeachment purposes of evidence that contradicts "false testimony"[11] given in response to cross-examination (A. 28-37).

In dealing with the use of evidence unconstitutionally seized, the Supreme Court stated, over sixty-five years ago, that the use of the seized evidence involved a denial of the constitutional rights of the accused. *Weeks* v. *United States,* 232 U. S. 383 (1914). The decision established the rule that, in a federal prosecution, the Fourth Amendment barred the use of evidence secured through an illegal search and seizure.

The rationale behind the exclusionary rule is stated by Justice Powell in *Stone* v. *Powell,* 428 U. S. 465 (1976) at 492, 493:

> Evidence obtained by police officers in violation of the Fourth Amendment is excluded at trial in the hope that the frequency of future violations will decrease. Despite the absence of supportive empirical evidence, we have assumed the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it. More importantly, over the long term, this demonstration that

11. Again, the "assumption of perjury" doctrine questioned at page 16, *supra.*

> our society attaches serious consequences to violation of constitutional rights is thought to encourage those who formulate law enforcement policies and the officers who implement them, to incorporate Fourth Amendment ideals into their value system.
>
> We adhere to the view that these considerations support the implementation of the exclusionary rule at trial.

It is understood that this Court is of the view that exceptions to the exclusionary rule will be made if the societal costs outweigh the policy considerations set forth by Justice Powell *Stone* v. *Powell, supra.*

However, adoption of the government's position in this case would severely limit the protection afforded the public by the Fourth Amendment.

Under the rule proposed by the government, a defendant could be intimidated into not taking the witness stand in his defense because police had obtained prejudicial evidence through unconstitutional means. The defendant would realize that no matter how he testified on direct examination, the suppressed evidence would be admitted, or in the alternative, he would be obliged to make damaging admissions.[12]

The Court of Appeals in the present case recognized this insidious danger when it stated:

> According to the view of the trial judge and the prosecutor, defendant could be asked on cross-examination a question, which answered affirmatively would admit the incriminating tendencies of the illegal evidence, and, answered negatively would allow the subsequent introduction of the illegal evidence for purposes of impeachment. (Pet. App. 8a)

12. It will require little imagination on the part of law enforcement officers (and others) to conclude that such a state of affairs makes all illegal evidence, however acquired, extremely valuable. Files could be opened on target persons and illegal evidence could be systematically gathered over extended periods in the secure knowledge that such evidence, collected unconstitutionally today, could be used tomorrow for purposes of impeachment or intimidation.

It is well known that if a defendant does not testify in his behalf, especially a defendant without a prior criminal record (as in the present case), his chances for acquittal are materially diminished.[13]

In the present case the issue is not a narrow evidentiary matter with little impact on society as a whole. It is an issue which involves every criminal trial where the Fourth Amendment is at issue, and it is submitted that the potential cost of accepting the government's position is far too high.

Of course a defendant does not have the right to commit perjury. The government has not demonstrated how the *Agnello* doctrine, as applied by the Court of Appeals in the present case, would facilitate perjury on the part of a defendant. It is when the government enters forbidden areas (made forbidden by its own illegal acts) on cross-examination that the possibility arises for false testimony which may not be impeached. *Agnello* should not be overruled.

II.

RESPONDENT'S DIRECT TESTIMONY IN THIS CASE PROVIDED NO BASIS FOR THE INTRODUCTION OF SUPPRESSED EVIDENCE FOR IMPEACHMENT PURPOSES.

In *Weeks* v. *United States, supra,* at 347 U. S. 65 the Court said:

> Of course, the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. *He must be free to deny all the elements of the case against him* without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief. (Emphasis added.)

13. Handbook on Criminal Procedure in the United States District Court (Federal Defenders Program of San Diego, Inc.) 218 (1967); Amsterdam, Segal & Miller, Trial Manual for the Defense of Criminal Cases (1967).

Respondent was charged, as was government witness McLeroth, with possessing cocaine with intent to distribute it and of importing cocaine, and of conspiring to import cocaine.

The government contends that the following direct examination testimony of respondent is relevant:

> Q. And you heard Mr. McLeroth testify earlier as to something to the effect that this material was taped or draped around his body and so on, you heard that testimony?
>
> A. Yes, I did.
>
> Q. Did you ever engage in that kind of activity with Mr. McLeroth and Augusto or Mr. McLeroth and anyone else on that fourth visit to Lima, Peru?
>
> A. I did not.
>
> * * * * *
>
> Q. I will ask you whether or not you were arrested with cocaine on your body or luggage or anywhere else.
>
> A. No, I was not (A. 34, quoted at Gov. Br. 5).

In no way does the above cited testimony make reference to the suppressed evidence. The taping and draping referred to was alleged by the government to have been the method used by McLeroth, with respondent's assistance, to smuggle cocaine some five months prior to their arrest. It allegedly occurred on the first trip to Peru, not the fourth, where the government charged that a pocketed T-shirt was used instead of taping and draping. The "activity" referred to in the direct interrogation of respondent was, simply put, the smuggling activity for which he was on trial, and he simply denied that he had been engaged in it. Respondent did not elaborate upon nor did he embellish his denial. He simply said, "I did not."

It is interesting to note that the government regards respondent's truthful testimony on cross-examination as sinister. In footnote 17 at page 40 of its brief the government says:

> It is clear that respondent was consciously avoiding reference to the T-shirt. When asked on cross-examination whether he had denied involvement in "the wrapping of any bandages or tee shirts or anything involving Mr. McLeroth," respondent replied: "I don't—I said I had nothing to do with any wrapping or bandages or anything, yes."

Respondent's denial on direct examination of having cocaine at the time he was arrested was just a denial of the charge of possession of cocaine with intent to distribute it.

The whole argument advanced by the government on this point was obviously an afterthought (note the basis for the introduction of the T-shirt at trial) and it was dealt with quite properly by the Court of Appeals.

ISSUES NOT RULED UPON IN THE COURT OF APPEALS.

Respondent strongly urges that this Court affirm the decision of the Court of Appeals in this case. Nevertheless, in the event that this Court should render a decision favorable to the government, attention is respectfully directed to certain issues, properly raised by respondent, which were not ruled upon by the Court of Appeals.

Misconduct of the Prosecution. The trial court committed prejudicial error by permitting the prosecution to:

a) Defy a court order and confer with the chief government witness (McLeroth) at a critical time during cross-examination of said witness.[14]

b) Mislead defense counsel by withdrawal of an agreement and waiver made in open court, depriving defendant of an opportunity to produce planned witnesses.

c) Use evidence restricted by the trial judge for rebuttal purposes as evidence of guilt during final argument.

Deprivation of Right to Counsel. The trial court violated respondent's right to counsel under the Sixth Amendment to

14. McLeroth had testified on direct examination that he had been in extreme poverty during the three years prior to his arrest, obviously suggesting to the jury that he was easy prey when respondent allegedly approached him to smuggle cocaine some seven months prior to his arrest (R. 72, 75-77). During cross-examination he was confronted with his personal checking account statements showing that he had run over a quarter of a million dollars through his personal account during 1974, 1975 and 1976, and that his personal telephone bills often totalled thousands of dollars per month (See p. 5, footnote 5, *supra*). At this point the trial court adjourned for the day, saying to witness McLeroth:

"The Court: You are on the witness stand, so you cannot talk overnight about your testimony with anyone." (R. 170)

(Footnote continued on next page.)

the United States Constitution when it banished respondent from the courtroom during the trial and refused to permit defense counsel to speak with or go to him. *Geders* v. *United States,* 425 U. S. 80 (1976).

The issue of the misconduct of the prosecution referred to above was fully briefed at pages 27 through 36 of respondent's (appellant's) brief in the Court of Appeals, and at pages 8 through 10 of his amended reply brief.

The issue of deprivation of right to counsel referred to above was fully briefed at pages 37 through 40 of respondent's (appellant's) brief in the Court of Appeals, and at pages 7 and 8 of his amended reply brief.

The Court of Appeals, however, in the obvious belief that its reversal of respondent's conviction made these issues moot, said,

"We do not treat his other contentions because they involve rulings on matters that are not likely to recur upon retrial of his case." (Pet. App. 2a, footnote 4).

In accordance with established practice of this Court, it is respectfully requested that, in the event of a decision herein adverse to respondent, this cause be returned to the Court of Appeals for the Fifth Circuit for consideration of those issues formerly considered moot.

(Footnote continued from preceding page.)

When defense counsel attempted to protest the defiance of that order by the prosecutor and McLeroth, the prosecutor explained to the Court that he had misunderstood the order and had not believed that it applied to him. (R. 189-190)

CONCLUSION.

The judgment of the Court of Appeals should be affirmed.

If the judgment of the Court of Appeals is reversed, this case should be returned to that Court for consideration of issues formerly considered moot (pp. 24-25, *supra*).

Respectfully submitted,

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